IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1165 of 1985
With
CRIMINAL REVISION APPLICATION No. 404 of 1985

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
MOHMAD HASAN ALIAS MUNNA S KURESHI & ORS

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Appearance :
MR KC SHAH APP for Appellant
MR IMRAN PATHAN FOR MR MM TIRMIZI for Opponents No. 1 - 2, 4,
Opponent No. 3 – Appeal stands abated

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 23/07/2007

ORAL COMMON JUDGMENT :

(Per : HONOURABLE MR.JUSTICE J.R.VORA)

1 This Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by learned Additional Sessions Judge, District Bharuch, on 10th of July, 1995, in Sessions Case No. 37 of 1985. The respondents herein were accused of the Sessions Case and were charged for the offences punishable under Sections 366, 354 and 323 of the Indian Penal Code. The Trial Court acquitted the respondents of all the charges in the said Sessions Case and, hence, this Appeal by the State.

2 The respondent No.3 Mohmed Bilal Amirbhai - original accused No.3 died on 03rd of September, 1993 during pendency of the Appeal and, hence, this Appeal was abated as against respondent No.3 in pursuance of the order passed by this Court on 17th of July, 2007.

3 Original complainant Mrs. Meenaben, wife of Dr. Pankanjkumar Modi also preferred a Criminal Revision Application No. 404 of 1985 and the same was admitted by this Court on 12th of March, 1986 and it was directed that the Revision to be heard along with present Criminal Appeal. As it appears that the learned Advocate appearing for the petitioner in the said Revision Application was

elevated to the Bench, a notice was served upon the complainant for engaging Advocate, but even after service of notice, none remained present on behalf of the complainant so far as Revision Application No. 404 of 1995 is concerned.

4 In nutshell according to prosecution case, complainant Meenaben, wife of Dr. Pankajkumar Modi, residing along with her husband at Bhatwad Maholla, Ankleshwar, had been to her mother's house situated at Mullawad Maholla, Ankleshwar, on the day of incident, i.e. on 12th of December, 1984. According to prosecution case, complainant knew accused No.1 then residing at Kasaiwad, and complainant knew him as Munna. Dr. Pankajkumar Modi was running a dispensary at Station Road, Ankleshwar and used to attend dispensary from 9.30 a.m. to 1.00 p.m. and thereafter 4.45 p.m. to 9.00 p.m. Complainant Meenaben was returning to her house at 8.00 p.m. as aforesaid on the day of incident and her husband Dr. Pankajkumar Modi had been to his dispensary at Railway Station. Complainant Meenaben had a purse and a basket of vegetables with her. On coming to the house, she noticed that a rickshaw was standing on the road nearby the gate of her house and she thought that some patient might have come to see her Doctor Husband. Meenaben attempted to open the gate of her house to enter, at that time, accused No.1, who was bending on rickshaw

was doing something in the rickshaw, came behind her, lifted and threw her on the floor of the rickshaw. There were three other persons in the said rickshaw. Original accused No.2 was sitting on the driver seat and accused Nos. 3 and 4 were sitting in passenger portion of the rickshaw. Accused Nos. 3 and 4 caught hold of the hands and legs of complainant Meenaben and she was thrown on the floor of the rickshaw. Complainant Meenaben raised cries and shouts but accused No.1 attempted to gag her by thrusting a roll of clothes in the mouth of the complainant. At the instructions of accused No.1, rickshaw started and was driven ahead towards Surti Bhagol. Complainant vigorously resisted the three accused. In this process, she threw her purse and vegetables basket on the road from rickshaw to attract the attention of someone so as to help her. When rickshaw reached near the public toilets which were situated at 150 to 200 spaces, at the instruction of accused No.1, rickshaw was slowed down and stopped. Meenaben was thrown out of the rickshaw from right side and thereafter all the four accused driven away towards Surti Bhagol in the said rickshaw. In resisting the accused in the said rickshaw, complainant sustained some injuries on her right elbow and left hand. She was much frightened and immediately returned to her house on foot from the place where she was abandoned. Certain persons met her on the way and all of them came with her to her house. Somebody from the neigbourhood went to

call Dr. Pankajkumar, husband of the complainant Meenaben. Dr. Pankajkumar came immediately and asked Meenaben about the incident. Both of them thereafter approached Ankleshwar Police Station and complainant lodged First Information Report with Ankleshwar Police Station, which is produced on record at Exhibit – 11. PSI Mr. Shaikh recorded the complaint for the above said offences against the accused and Mr. Shaikh gave a yadi to the complainant for medical examination and treatment, if any. According to complainant since it was dark at night, she did not go to the hospital at that time but had been to the hospital on the next day at 8.00 a.m. The investigation was entrusted to Senior PSI Mr. Parmar and he investigated to certain extent. Medical Officer Dr. Jagadish Vyas examined complainant at about 8.00 a.m. on 13th of December, 1984 and found 14 injuries on the body of complainant. The accused were arrested on 14th of December, 1984 at about 11.15 hours. It is revealed from the record that the investigation by PSI Parmar was objected and criticized and, therefore, the investigation was stayed for some time. It appears that by intervention of superior officers, the investigation thereafter was entrusted to the Circle Police Inspector Mr.K.C. Bava and he took the charge of investigation from 19th of December, 1984. He recorded further statement of complainant Meenaben and other eye witnesses. He seized the torn blouse produced by complainant Meenaben. Ultimately, Mr.

K.C. Bava submitted charge sheet against the accused in the court of learned J.M.F.C., Ankleshwar, and the case came to be committed to the Court of Sessions by learned JMFC, Ankleshwar and was registered as Sessions Case No. 37 of 1985.

5 Learned Additional Sessions Judge framed charges against all the four accused vide Exhibit – 3 on 26th of April, 1985. All the four accused pleaded not guilty and, hence, the prosecution adduced evidence to prove its case.

6 Prosecution examined 14 witnesses and produced on record documentary evidence to prove its case.

7 On evidence being over, statements of each of the accused came to be recorded by the learned Trial Court under Section 313 of the Code of Criminal Procedure and the explanation of all the accused was that the prosecution had filed a false case against them. Accused No.1 offered his written explanation at Exhibit – 37 wherein he stated that in Kasaiwad including him there were six accused, each was known as munna. According to accused No.1, there was communal enmity between Modh Ghachi caste of Ankleshwar, to which complainant belonged and Muslims, and election of Parliament was going on at the

time of incident and the whole caste of Modh Ghachi was against the Muslim candidate of Congress Party and attempting hard to defeat the said Muslim candidate, and on account of this, he was falsely involved in the incident. According to him, he did not know any of the witnesses nor none of the witnesses knew him.

8 The learned Trial Judge heard prosecution as well as the defence and came to the above conclusion of acquittal of the accused and, hence, this Appeal and above Criminal Revision Application by complainant.

9 The learned APP Mr. K.C. Shah in Criminal Appeal submitted on behalf of the State - appellant vehemently that the impugned judgment and order is against the weightage of the evidence and result of improper appreciation of evidence by the Trial Court. Difference in injuries of complainant mentioned by her in the complaint and medical certificate is not significant to come to the conclusion of acquittal. It is submitted that there was agitation by castes against the investigation cannot also be basis for acquittal of accused and witnesses could not be disbelieved on those grounds. Witnesses have stated that the incident had been noticed by them near electric pole and the evidence of Investigating Officer that there was dark when the incident

occurred, has no relevance at all. When evidence of witnesses is appreciated in its totality, it could not be said that they were chance witnesses because in evening time traders would be usually going to their homes or walkers would be found on road, and on that count, the evidence of witnesses cannot be discarded. Though the statements of the witnesses were recorded on 19th of December,1984, when investigation was entrusted to Senior CPI Mr.K.C. Bava, but this explanation was not asked by the defence in cross-examination that how the statement came to be recorded on 19th of December, 1984 only. There is no reason logical to discredit complainant and further more to discredit eye witnesses who fully corroborated the version of the complainant and, therefore, the reasonings of the Trial Court are perverse and against the weightage of the evidence. The complaint was filed within one hour and identity of accused No.1 was fully established beyond reasonable doubt. On probability it would not stand to reason that only on account of Parliament Election and only on account of Modh Ghachi caste was against Muslim candidate, the accused were made scape goat. In fact, defence remained mere suggestions and not probability. The view of the learned Trial Judge that victim could not have been made to lie on rickshaw floor appears to be totally perverse. In fact, no cogent reasons could be assigned by the Trial Judge for not believing the complainant and the evidence of

eye witnesses, and this weighty evidence was erroneously discarded by the Trial Court on flimsy grounds. It is submitted that on the whole, this is a fit case wherein findings being perverse, required to be set aside and accused are required to be convicted for the offence for which they are charged. It is submitted that there cannot be any better evidence for the said incident could have been adduced by the prosecution in the present case. Learned APP Mr. K.C. Shah relied upon certain decisions.

10 While learned Advocate Mr. Imran Pathan on behalf of learned Advocate Mr. M.M. Tirmizi for the respondents No. 1, 2 and 4 in the Appeal and for the Opponents No. 1, 2 and 4 in the Criminal Revision Application vehemently submitted that the complainant made material improvements in her deposition and, therefore, she could not be relied upon by the Trial Judge and rightly so because the manner in which the incident is said to have occurred and investigation progressed, casts doubt on prosecution story. According to learned Advocate for the respondents, the learned Trial Judge properly appreciated the evidence of complainant and other three eye witnesses and scrutinized the prosecution case in its totality and thereafter came to the conclusion that the complainant was not trustworthy and that she did not get corroboration from the eye witnesses, whose evidence also was not reliable. The learned Advocate for the respondents pointed out the

reasonings and findings of the Trial Court from the judgment and submitted that this is an appeal against the order of acquittal and the scope of such appeals is narrow. It is submitted that unless it is found that the view taken by the Trial Judge cannot stand to reason in any manner, no interference is permitted in the order of acquittal even if from the same evidence second view is possible. The learned Advocate discussed in detail the findings and reasonings of the Trial Judge with appreciation of the evidence in detail and submitted that Appeal as well as Criminal Revision Application both required to be dismissed.

11 Having heard learned counsels for the parties and in view of the rival contentions, necessary it is to view the scope of the Appeal against the orders of acquittals. The Apex Court well explained the scope of Appeals against acquittals in the matter of AJIT SAVANT MAJAGAVI vs. STATE OF KARNATAKA, as reported in (1997) 7 SCC 110 and the Apex Court observed as under in Para – 16 with reference to the principles to deal with the appeals against the orders of acquittal.

> (1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers, it possesses while hearing an appeal against the order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record,or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then

the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the court especially in the witness box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

12 It is necessary, therefore, to see the gist of evidence recorded during trial and more particularly the findings recorded by the Trial Court for arriving at the conclusion of acquittal of the accused.

12.1 PW-1 Meenaben - complainant and victim is examined at Exhibit – 10. She stated with reference to the incident that while she was returning from her mother's house at about 7.45 p.m. and was coming to her house at Bhatwad, she found one rickshaw standing near the gate of the compound of her house. She thought that someone

might have come to consult her Doctor husband and, therefore, she left the rickshaw alone and went to open the gate of her compound. At that time, accused No.1, to whom she knew as Munna, was doing something in the rickshaw bending down and other accused were with him. While she was opening the gate of her compound and when she turned his back towards the rickshaw, accused No.1 caught hold of her and lifted her and made her lying on the floor of the rickshaw. Other two accused were sitting in the rickshaw, who caught hold of her hands and legs and one accused was driving the said rickshaw. She raised cries and attempted to resist the hold of the accused upon her. The rickshaw started at the instruction of accused No.1 and driven towards Surti Bhagol. She threw away her purse and vegetables basket on the road so as to attract the attention of passers-by to save her. In this process of resisting the accused, she sustained injuries on her hand and cheek. The rickshaw ultimately at the instruction of accused No.1, according to her, was stopped near municipality public toilets and she was pushed down from the rickshaw from the right side and accused drove away the rickshaw. She was very much frightened and came to her house walking where she met with a group of persons on the way. Her husband was called from the dispensary and a complaint was lodged. The complaint is produced at Exhibit – 11.

12.2 PW-2 Jagdish Liladhar Vyas is examined at Exhibit – 14. He stated that he examined Meenaben Pankajkumar Modi in Primary Health Centre, Sajod, on 13th of December, 1984 at about 8.00 a.m. with police yadi. She had following injuries on her person.

(1) Abrasion 2" x 1/2" on the right pectoral region, upper part oblique.

(2) Abrasion 1" x 1/2" on the right pectoral region upper part, oblique about 1/4" laterally to injury No.1..

(3) Abrasion 2" x 1/3" on the left shoulder. It was transverse.

(4) Abrasion 1 1/2" x 1/2" on the left shoulder parallel to injury No.3.

(5) Bruise 1" x 1/2" on the upper lip transverse.

(6) Bruise 1 1/2" x 1'2" x 1'2" on the lower lip transverse.

(7) Abrasion teeth mark 4 upper and 3 on lower side – surrounded of bruises 2" in diameter on left cheek.

(8) Bruise 3" x 1/4" on the posterior side of the left forearm.

(9) Bruise 1" x 1'4" on the left forearm on the posterior side about 1/2" lateral to injury No.8.

(10) Bruise 3" x 1/4" on the lateral side of the left lower leg on the 3" below the left knee.

(11) Bruise 2" x 1/2" transverse about 2" above left lip joint.

(12) Bruise 2" x 1/3" x about 3" above the right lip joint laterally.

(13) Abrasion teeth marks 3 on the upper and 2 on the

lower side on the right hand posteriorly.

He placed on record the Certificate in this respect at Exhibit – 16.

12.3 PW-3 Sudhirkumar Uttambhai examined at Exhibit -7 is panch of two panchnamas at Exhibits 18 and 19. Those panchnamas are scene of offence, one near public toilets where the complainant was pushed out of the rickshaw and one panchnama of scene of offence from where the complainant was kidnapped near the house of the complainant.

12.4 PW-4 Kiritkumar Chunilal examined at Exhibit – 20 is a panch of panchnama at Exhibit – 21 whereby on 19th of December, 1984, complainant produced her torn blouse which was seized by the Investigating Officer.

12.5 PW-5 Haribhai Jagabhai examined at Exhibit - 22 is panch of panchnama at Exhibit – 23 whereby rickshaw used in the incident was seized by the Police.

12.6 PW-6 Dayalbhai Naranbhai examined at Exhibit – 24 is panch of panchnama whereby it is alleged that accused presented a

cloth which was thrust in the mouth of the complainant at the time of the incident. PW-6 Dayalbhai Naranbhai has not supported the prosecution case.

12.7 PW-7 Chunilal Naginlal Gandhi, examined at Exhibit-27 is an eye witness and according to the prosecution case, on the day and at the time of the incident, he was passing through Bhatwad area and when he reached near electric pole, he saw one rickshaw passing by and in the said rickshaw complainant Meenaben was made to lie on the floor of rickshaw and accused No.1 was attempting to thrust a roll of cloth in the mouth of the complainant. He followed the rickshaw to some distance and thereafter he shouted for running behind the rickshaw and some adivasi boys chased the rickshaw. He noticed that Meenaben was pushed down from the rickshaw near public toilet and was crying and was coming towards him. On inquiring, Meenaben told the story that she was kidnapped. He was cross-examined in detail, particularly with reference to his presence at the time of the incident and with reference to he being of the caste of the complainant and about his statement being recorded on 19th of December, 1984.

12.8 PW-8 Gumanbhai Uttambhai, examined at Exhibit – 28 also is an eye witness and according to him he was Lecturer in Commerce

College at Bharuch and while he was passing near the house of the complainant on 12th of December, 1984, at about 7.45 p.m. and was going for a walk, he noticed that a rickshaw was parked near the house of the complainant and accused No.1 was standing and on inquiring, accused No. 1 stated that he had been there with the patient and was waiting for Doctor. The witness also noticed that accused No.3 was lying in the rickshaw and other accused was sitting. Thereafter the witness went on for a walk. While returning from walk at about 8.30 p.m., he found that something had happened at the house of Dr. Pankanjkumar and, therefore, he went to the house of Dr. Pankajkumar and inquired that what had happened. He found that the complainant was frightened and Doctor conveyed him the incident. In his cross-examination, certain contradictions were asked in para-3, and his presence at the scene of offence was challenged and particularly it was asked about the caste meeting took place after the incident to deprecate the incident. He submitted that a public invitation was circulated for a caste meeting and that he belonged to the same caste of Modh Ghachi.

12.9 PW-9 Chunilal Gopalbhai Prajapati examined at Exhibit – 29 also according to the prosecution case was an eye witness and noticed the incident of kidnapping the complainant by the accused in rickshaw, but he did not support the prosecution case and

prosecution declared him hostile.

12.10 PW-10 Jaswantlal Hiralal Modi examined at Exhibit – 30 is also an eye witness and he stated that he was going to his house after closing his shop and when he reached near the house of the complainant he noticed accused No.1 Munna and also noticed that the complainant was opening the gate of her compound. According to the witness, he saw that accused No.1 caught hold of the complainant, lifted her and threw her in the rickshaw. According to the witness, complainant Meenaben raised shouts and cries and he ran after the rickshaw. Some Adivasi boys also chased the rickshaw. In the meantime, Meenaben was released by the accused near the public toilet and he inquired from Meenaben that what had happened. Meenaben had replied that accused No.1 was kidnapping her and there were two other persons also. They also returned to the house of the complainant and this witness found that there were simple injuries on the hands of the complainant. In his cross-examination, he admitted that he belonged to Modh Ghachi caste. His presence at the scene of offence was challenged and he also admitted that a caste meeting was convened through a public circular to deprecate the incident.

12.11 PW-11 Mohammed Zuber Lal Mohammed Shaikh,

examined at Exhibit – 31 was the then PSI of Ankleshwar Police Station, who recorded the complaint as offered by the complainant at 21.00 hours on the day of incident and registered the crime. He entrusted the investigation to PSI Mr. Parmar.

12.12 PW-12 Udesing Dalabhai Parmar examined at Exhibit – 32 is the Investigating Officer. According to him, as soon as the investigation was entrusted to him, he draw the panchnama of scene of offence and recorded the statement of Meenaben on 13th of December, 1984 and other witnesses. On 14th of December, 1984, he arrested the accused and roll of cloth used to gag the complainant was seized by him as well as the rickshaw was also seized. In the meantime, all accused were released on bail and the complainant side requested him to suspend the investigation and thereafter he entrusted this investigation to CPI Mr. K.C. Bava on 19th of December 1984. He has been cross-examined by the defence.

12.13 PW-13 Kantipuri Chhaganpuri Bava, the then CPI and second Investigating Officer has been examined by the prosecution at Exhibit – 34. According to him, he took the investigation on 19th of December, 1984 in pursuance of the order passed by District Superintendent of Police, Bharuch. He Recorded the further statement

of Meenaben and thereafter recorded the statements of the witnesses Chunilal Gopal Prajapati, Pushpaben, Amrutbhai Chhitubhai , Natvar Mohan Vasava, Guman Utthambhai Panadiwala, Chunilal Gandhi, Jasvantlal Hiralal etc. On 19th of December, 1984, complainant presented a torn blouse which was seized by him through the panchnama and filed a charge sheet. He has been cross-examined by the defence particularly it was alleged that three eye witnesses were got up witnesses and he admitted that in his investigation it was revealed that at the time of the incident there was no electric light in the area in which the incident occurred.

13 This is all the evidence of the prosecution.

14 We have undertaken a complete and comprehensive appreciation of all vital features of the prosecution case and the entire evidence on record with reference to the broad probabilities of the case and we have also considered the contentions raised by both the learned counsels for the parties. We have also re-appreciated the evidence recorded during the trial. However, when this is an Appeal against the acquittal, it is first necessary to examine whether the reasons assigned by the Trial Court for the acquittal are perverse and against the weightage of the evidence which requires whether any interference.

15 While appreciating the evidence recorded during the trial and while recording findings, the learned Trial Judge took into consideration the principles laid down by the Apex Court in the matter of BHARWADA BHOGINBHAI HIRJIBHAI vs. STATE OF GUJARAT, as reported in 1983 GLH 792 and stated that complainant in such cases needed no corroboration if her evidence was found reliable. Minor discrepancies which did not go to the root of the case, cannot shake the basic version of the witnesses. Keeping in mind these principles, the learned Trial Judge appreciated the evidence of complainant and found that the evidence of the complainant as a whole did not inspire any confidence about the truth and probability. The learned Trial Judge stated that though there were no major contradictions but when case was viewed from totality, no reliance could be placed in the testimony of the complainant Menaben. The learned Trial Judge did not place reliance on the evidence of the complainant because he found that the complainant was concealing truth. The first reason which the learned Trial Judge gave to disbelieve the complainant was that she presented one torn blouse only on 19th of December, 1984 before Investigating Officer Mr. K.C. Bava even though she offered her complaint on 12th of December, 1984 and the First Investigating Officer recorded her further statement on 13th of December, 1984. The prosecution case did not reveal anything about torn blouse either in the complaint or till 19th of

December, 1984. According to the learned Trial Judge, this circumstance was against the weightage of the evidence deposed by the complainant. She denied that her statement was recorded by PSI Mr. Parmar on 13th of December, 1984 and ultimately on account of this, the Trial Court found the version of the complainant most doubtful and unreliable. She admitted that PSI Parmar visited her house on 13th of December, 1984. She showed the scene of offence to the Investigating Officer. A panchnama was also drawn. The first Investigating Officer Mr. Parmar stated categorically that he recorded the statements of the complainant on 13th of December, 1984, even then, the theory of torn blouse was not revealed during investigation till 19th of December, 1984. The learned Trial Judge observed that the complainant was a housewife and a grown up lady, and if at all her blouse was torn in the incident, she must have stated that in her complaint or in her statement recorded by the PSI Mr. Parmar on December 13, 1984. She also stated that she sustained minor injuries on hand and cheek as her hands were caught hold by the accused, but the medical evidence revealed that she had more injuries than she stated in the complaint. She never stated about the injury on cheek, and that too by tooth bite, as opined by a medical evidence. The witnesses also stated that Meenaben had minor injuries on her hands, and though the witnesses saw complainant Meenaben soon after the incident, but they also did not notice the injury on Cheek of

the complainant. The learned Trial Judge found material inconsistencies in the prosecution case with regard to the injuries on the person of the complainant Meenaben so as to disbelieve the say of the complainant. Meenaben failed to state in complaint and deposition any kind of teeth mark injuries on cheek and other injuries found on her body including on the lower lip which were visible injuries and those injuries, according to Trial Court, were categorically found by the Doctor who examined her. The learned Trial Judge therefore found that the complainant was not telling the complete and whole truth. While dealing with the probability of the testimony of the complainant Meenaben, the learned Trial Judge further stated that according to the complainant, she threw her purse and basket of vegetables from the rickshaw on road to attract the attention of someone to save her, but the prosecution failed to account for these two articles, and according to the learned Trial Judge, this was very material circumstance that the police did not attach the articles. Further, the complainant admitted that the vegetables basket and purse were in her house when the Investigating Officer Mr Parmar visited her house on 13th of December, 1984. The learned Trial Judge also expressed suspicion that the floor of rickshaw which had admittedly was about 2¼ feet long and 1¼ feet wide, then how healthy and robust complainant of 5" 4" could be made to lie in the floor of rickshaw. The learned Trial Judge stated that this

was improbable and the version of the complainant was doubtful. The learned Trial Judge thereafter discussed in details the manner in which the complainant deposed as to how she was made to lie in rickshaw and how the same was improbable. According to learned Trial Judge these all were the possible circumstances casting heavy doubt about the truth and probability of the testimony of the complainant Meenaben and that the evidence of complainant herself was not trustworthy, cogent and free from doubt, could not be relied upon without sufficient corroboration. Therefore, the learned Trial Judge thereafter undertook the exercise to appreciate the evidence of three eye witnesses as to whether those eye witnesses corroborate the say of the complainant.

16 In appreciating and corroborating the evidence, the learned Trial Judge stated that witness PW-9 Chunilal Gopalbhai Prajapati, Exhibit- 29, though was neighbour of complainant Meenaben did not support the prosecution case and he was an independent witness as he did not belong to the caste of the complainant. For remaining three eye witnesses i.e. PW-8 Gumanbhai Uttambhai, PW-7 Chunilal Naginlal Gandhi and PW-10 Jaswantlal Hiralal Modi, the learned Trial Judge observed that they were got up witnesses and chance witnesses and failed to corroborate the evidence of the complainant. Firstly, according to the learned Trial Judge, all the three witnesses came on scene during

investigation only on 19th of December, 1984 when upon the insistence of complainant side, the investigation was entrusted to the Investigating Officer, PW-13 Mr.K.C. Bava. The learned Trial Judge also considered that all the three witnesses were present in the house of complainant when she was released by the accused near Municipality toilet. All the three, according to prosecution evidence, had noticed the injuries on the hands of complainant and the complainant Meenaben conveyed the incident to him, even then, neither in the complaint Meenaben narrated the names of these eye witnesses nor in the further statement recorded by PSI Mr. Shaikh on 13th of December, 1984 stated anything about witnesses and perhaps she falsely therefore stated that on 13th of December, 1984 her statement was not at all recorded and suddenly on 19th of December, 1984 Mr. K.C. Bava taking charge of investigation, recorded the statements of these three witnesses. These circumstances could not be explained by the prosecution and no explanation came forward from the complainant also that how these material witnesses could not be disclosed at the earlier stage. In this respect, the learned Trial Judge indicated that it was admitted fact during the evidence, that a caste meeting was called on 16th of December, 1984 as per the public invitation, copy of which is placed on record at Exhibit – 13. About PW-7 Chunilal Naginlal Gandhi, Exhibit-27, the learned Trial Judge stated that his usual way to go home was different and in that

way Bhatwad was not located though he stated that he was going to his sister's house, but he could not explain that how on that particular day he happened to go to his sister's house. The learned Trial Judge has also referred to the contradictions between the evidence of this witness and the evidence of the Investigating Officer about the electric lights to notice the incident. About PW-10 Jaswantlal Hiralal Modi, Exhibit – 30, the learned Trial Judge also observed that there was no reason for this witness to pass through the locality of Bhatwad and the usual way to go to his house was different. He failed to give any special reason which made him to go through the way of the alleged incident on 12th of December,1984. About PW-8 Gumanbhai Uttambhai, Exhibit-28, the learned Trial Judge observed that the manner in which this witness deposed before the court casts doubt in his say and failed to inspire any confidence. His evidence was in contradiction with other circumstances such as lying down of the complainant on the floor of the rickshaw, etc. All these three witnesses belonged to the caste of the complainant and admitted that a caste meeting was called to deprecate the incident and the evidence of these three witnesses were not free from doubt and, therefore, the learned Trial Judge came to the conclusion that material evidence of complainant Meenaben, witness Chunilal Naginlal Gandhi, witness Jaswantlal Hiralal and witness Gumanbhai Uttambhai were not reliable, trustworthy and cogent and free from doubt and it would not

proper to act upon such doubtful and flimsy piece of evidence in these circumstances.

17 Now scrutinizing the above evidence, above reasoning and findings of the Trial Court, it must be borne in mind that the learned Trial Judge is the best judge to assess the creditworthiness of the witnesses because the Trial Court has an opportunity to observe the demeanour of the witness and overall performance in the witness box. In each case, it becomes the duty of the court to find out the truth and eliminate the falsehood. But where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. The credibility of a witness is not a matter related by rules and procedure. It depends upon many factors like wish of the witness to speak truth and truth only. Regard for the truth, overall circumstances of the prosecution case, broad and reasonable probabilities and contradictions going to the root of the case decides the credibility of witness. Mere consistent testimony of a witness is not sure guarantee of truthfullness. When court finds credibility of a witness

is impeached, probability in ordinary course of nature is against the general tenure of prosecution evidence and when it is found that the prosecution witnesses suppressed genesis of the incident and not deposing the truth and the whole truth, a doubt is created in prosecution case.

18 While assessing the case as a whole carefully and going through each corner of the evidence recorded during the trial and after re-appreciating the evidence independently, we found that there are no reasons to come to a different finding than the finding arrived at by the Trial Court. The view taken by the Trial Court for discrediting the witnesses and expressing suspicion about the truth in the testimony of the complainant is reasonable and cogent even by the standard of prudent person. The doubt is created in the testimony of the complainant because when the Trial Judge examined the prosecution story as a whole, keeping in mind the overall circumstances of the prosecution case, the Trial Court found that the say of the complainant could not stand the test of probability which was rigidly and carefully applied by the Trial Court. Same is the case with the three eye witnesses which were discussed in detail by the learned Trial Judge. Though, as aforesaid we have undertaken independent scrutiny of the evidence but we found that it is not possible to take a different view than the view

taken by the Trial Court. It must also not be forgotten that in this respect established law is that even if second legitimate view could be taken from the evidence recorded different than taken by the Trial Court, the order of acquittal cannot be interfered with unless the reasoning and findings arrived at by the Trial Court are against the weightage of evidence, palpably wrong, manifestly erroneous or demonstrably unsustainable. We could not brand the above noted findings of the Trial Court to be palpably wrong, manifestly erroneous and demonstrably unsustainable for the reasons recorded above that creditworthiness of witnesses is to be judged from many factors keeping in view the overall circumstances of the prosecution case and before acceptance of evidence of any witness, it has to pass through the rigid test of probability.

19 For the reasons recorded above, we generally agree with the view expressed by the Trial Court and we do not require to give further reasons. However, we make one exception to the extent that the Trial Court was wrong and erroneous in casting aspersion on the character of the complainant. It is one probable and possible thinking that on account of unreliable evidence of the prosecution, the case of the prosecution could be said to have not proved beyond reasonable doubt and benefit of doubt always goes to the accused, but it can never be said that once the prosecution fails to prove the case against the accused

beyond reasonable doubt, the degree of probability of defence taken by the accused increases to a higher level and to the extent that as soon as the prosecution fails, the defence becomes probable. In the present case, in the form of suggestions, some questions were asked to the complainant in cross-examination casting aspersion on her character. These are, in our view, mere suggestions and there are no supporting circumstances in prosecution case in favour of the said suggestions. However, even then, the learned Trial Judge came to the conclusion that the prosecution failed to prove the case against the accused and witnesses did not substantiate the prosecution story and when the prosecution had no legs to stand, the defence of the accused was probable that complainant Meenaben was in acquaintance with one stranger even before her marriage with Dr. Pankajkumar Modi and that stranger used to visit her house, and on the day of the incident stranger visited the house of Meenaben and he assaulted her indecently. The learned Trail Judge observed that if the facts and circumstances of the case so viewed, it could not be ruled out that there were some substance at least in the defence version of the accused.

20 In our humble view, these observations of the Trial Court are required to be expunged as they are totally unnecessary and extraneous and are casting unnecessary aspersions upon the character

of the complainant as we do not find any circumstance supporting the version of the defence that complainant had any relation with third person before marriage and she had injuries on her body on account of scuffle with said acquainted third person. Therefore, we direct that those observations of the Trial Court accepting the probability of defence case about having relationship of the complainant with the stranger must be discarded and expunged. Except this, we do not find the judgment and order impugned in the Appeal exceptionable.

21 In view of the discussion there is no merit in the Appeal against the acquittal, and for the same reasoning, the Criminal Revision Application No. 404 of 1985 also fails as we have dealt with the subject matter extensively in Criminal Appeal No. 1165 of 1985.

22 For the above said reasons, Criminal Appeal No. 1165 of 1985 and Criminal Revision Application No. 404 of 1985 both stands dismissed. Rule issued in Criminal Revision Application No. 404 of 1985 stands discharged.

(J. R. VORA, J.)

(SMT. ABHILASHA KUMARI, J.)

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